

IN RE: *

ROBERT W. MUMFORD, JR., *

Debtor. *

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LISA A. MUMFORD, *

Plaintiff, *

vs. *

ROBERT W. MUMFORD, JR., *

Defendant. *

CASE NUMBER 03-46579

ADVERSARY NUMBER 04-4080

The matter before the Court is the Motion for Summary Judgment on the Complaint to Determine Dischargeability (the "Motion for Summary Judgment" and the "Complaint," respectively). Debtor/ Defendant Robert W. Mumford, Jr. ("Debtor" or "Defendant") and Plaintiff Lisa A. Mumford ("Plaintiff") filed a Chapter 13 petition (Case No. 01-40920) on March 16, 2001, which was voluntarily dismissed by order dated July 16, 2001. Subsequently, Debtor filed the instant Chapter 7 case (Case No. 03-46579) on December 29, 2003. Plaintiff sought and obtained relief from stay to pursue a divorce proceeding. Debtor received

a discharge on June 22, 2004, but, on July 29, 2005, the Court vacated that discharge as being improvidently entered.¹

On April 26, 2004, Plaintiff filed the Complaint to determine the dischargeability of certain debts. The Motion for Summary Judgment was filed on January 7, 2005. Defendant failed to file any response to the Motion for Summary Judgment. For the reasons set forth below, this Court grants summary judgment in favor of Plaintiff.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

F A C T S

While still married, Plaintiff and Defendant filed a joint petition under Chapter 13 of Title 11 (Case No. 01-42943) on March 16, 2001. The couple paid into a plan but, because of certain unresolvable issues in the case, the plan was not confirmed. That case was dismissed on July 16, 2001. At the time of dismissal, the Chapter 13 Trustee held Thirty-Two Thousand One Hundred Thirty-Nine and 24/100 Dollars (\$32,139.24) in funds that had not been disbursed. This amount was refunded to Defendant in two checks made payable jointly to Plaintiff and

¹Debtor filed a Chapter 13 petition (Case No. 05-44049) on July 11, 2005 and the Court issued an Order to Appear and Show Cause for failure to file all necessary paperwork, which was heard on August 18, 2005. Because of the reinstated pending Chapter 7 case, the Chapter 13 case should be dismissed.

Defendant (the "Refund Checks").

During the pendency of Case No. 01-42943, the parties filed for divorce in the Mahoning County Court of Common Pleas, Division of Domestic Relations (the "Domestic Relations Court"). Plaintiff alleges, and Defendant does not contest, that during this time, Defendant received and cashed the Refund Checks, without the knowledge or consent of Plaintiff.

The parties reached a settlement in the Domestic Relations Court in late December 2003 which required Defendant to pay child support, medical expenses, and half of the amount of the Refund Checks to Plaintiff. On December 29, 2003, two weeks after negotiation of the divorce settlement, but prior to Defendant delivering the required refund payment to Plaintiff, Defendant filed the instant bankruptcy case (Case No. 03-46579). Defendant listed Plaintiff as a creditor, based on the payments dictated in the divorce decree.

Plaintiff filed the Complaint to determine the discharge-ability of the payments required by the divorce decree, *i.e.* half of the amount of the Refund Checks, as well as the payments due to Plaintiff for the support and medical expenses of the couple's two minor children.

S T A N D A R D O F R E V I E W

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that,

[t]he judgment sought shall be rendered forth-with if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the Movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the

existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

D I S C U S S I O N

Exceptions to the general dischargeability of debts are set forth in 11 U.S.C. § 523. Plaintiff's claims against Defendant stem from their negotiated separation agreement, which was incorporated into the final divorce decree, and include two distinct types of payments: (1) monthly child support (including medical expenses), and (2) payment of half the amount of the Refund Checks (in the amount of Sixteen Thousand Sixty-Nine and 62/100 Dollars (\$16,069.62)).

Pursuant to 11 U.S.C. § 523(a)(5), debts payable to a

spouse, former spouse, or child of the debtor for support of such party in connection with a separation agreement or divorce decree are an exception to discharge. In order to fall within the scope of § 523(a)(5), the obligation must entail a positive duty on the part of the debtor to perform some act that operates in support of the former spouse (or child). *Ramsey v. Hiller (In re Hiller)*, 44 B.R. 764 (Bankr. N.D. Ohio 1984).

The payments due to Plaintiff for child support, including the portion of any medical expenses incurred, fall within the ambit of 11 U.S.C. § 523(a)(5). These payments are to provide for the support of the couple's two minor children while they are in the care of Plaintiff. The parties negotiated and entered into a separation agreement. Defendant does not allege any reason not to enforce the child support agreement or other aspects of the separation agreement. Therefore, pursuant to 11 U.S.C. § 523(a)(5) of the Bankruptcy Code, the payments for monthly child support and medical expenses are not dischargeable.

Plaintiff alleges that payment of half of the Refund Checks owed to her by Defendant is nondischargeable for the following reasons: (i) the debt arises from false pretenses, false representations or fraud (11 U.S.C. § 523(a)(2)); (ii) the debt arises from willful and malicious injury (11 U.S.C. §

523(a)(6));² and/or (iii) the debt arises from divorce proceedings (11 U.S.C. § 523(a)(15)). Defendant cashed the Refund Checks, without Plaintiff's knowledge or consent, even though such checks were jointly payable to Plaintiff and Defendant. Defendant agreed to return to Plaintiff her half of the Refund Checks and was so ordered to do so by the Domestic Relations Court. Defendant failed and refused to pay Plaintiff the money awarded to her by the Domestic Relations Court and then, almost immediately, filed this Chapter 7 proceeding.

Plaintiff has established the elements of 11 U.S.C. § 523(a)(2). The uncontroverted facts demonstrate that: (1) Defendant made false representations by cashing the Refund Checks and agreeing to pay Plaintiff her half share; (2) Defendant knew these representations were false at the time he made them; (3) Defendant made the representations with the intent to deceive Plaintiff and deprive her of her share of the Refund Checks; (4) Plaintiff justifiably relied on Defendant's representation to pay her; and (5) Plaintiff has suffered loss as a proximate result of Defendant's misrepresentation.

According to *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (B.A.P. 6th Cir. 1998), prior debts and agreements are

²Because it is clear that Plaintiff is entitled to judgment based on 11 U.S.C. § 523(a)(2) and (15), this Court will not determine whether the elements of 11 U.S.C. § 523(a)(6) are established. It is generally difficult to ascertain willfulness and malice in a summary proceeding.

governed solely by the divorce decree once they are integrated into the divorce decree. The divorce decree then becomes the sole source of the obligation and the means of enforcement. Because Debtor was ordered, pursuant to the terms of the divorce decree, to pay Plaintiff half of the Refund Checks, this debt falls within 11 U.S.C. § 523(a)(15). Section 523(a)(15) states that a debt is an exception to discharge when it is incurred by the debtor in the course of divorce or separation, but is not of the kind described in 11 U.S.C. § 523(a)(5). Section (a)(15) covers debts incurred in the course of a divorce, such as additional payments and payments of attorney fees, etc. The nondebtor spouse bears the initial burden of establishing that the debt was incurred by the debtor in the course of a divorce or separation or in connection with a divorce decree. When that is established, the burden shifts to the debtor to prove one of the exceptions to payment under 11 U.S.C. § 523(a)(15)(A). *Melton v. Melton (In re Melton)*, 228 B.R. 641 (Bankr. N.D. Ohio 1998); *Henderson v. Henderson (In re Henderson)*, 200 B.R. 322, 324 (Bankr. N.D. Ohio 1996).

Affirmative defenses to the exception to discharge in 11 U.S.C. § 523(a)(15) are: (i) the debtor's inability to make the payments from income or property not reasonably necessary for the maintenance or support of the debtor; and (ii) discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the spouse, former spouse or

child of the debtor. Defendant's Answer to the Complaint does not assert any affirmative defenses based on 11 U.S.C. § 523(a)(15). Moreover, Defendant has failed to respond to the Motion for Summary Judgment.

Therefore, the Court grants summary judgment in favor of Plaintiff. Pursuant to 11 U.S.C. § 523(a)(5), the payments of child support and associated medical expenses are not discharged and, pursuant to 11 U.S.C. § 523(a)(2) and (15), the debt of Sixteen Thousand Sixty-Nine and 62/100 Dollars (\$16,069.62) (half of the Refund Checks) is not discharged.

An appropriate order will follow.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

ROBERT W. MUMFORD, JR.,

Debtor.

CASE NUMBER 03-46579

LISA A. MUMFORD,

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vs.

ADVERSARY NUMBER 04-4080

ROBERT W. MUMFORD, JR.,

Defendant.

O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, this Court grants summary judgment in favor of Plaintiff Lisa A. Mumford pursuant to 11 U.S.C. § 523(a)(2), (5) and (15).

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE